No. 224

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 224

JOSEPH JOHN CANNELLA,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on May 20, 1958.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra, p. 15), is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 20, 1958 (Appendix, infra, p. 34). A timely petition for rehearing was filed, and this petition was overruled on June 27, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether admissions obtained from a "de facto" defendant called before the grand jury for the purpose of obtaining evidence for use against him at the trial are admissible into evidence and whether testimony may be taken from a person before a grand jury after it has been decided to seek an indictment against him where the person is not advised that he is a "de facto" defendant, without violating the self-incrimination clause of the Fifth Amendment and the assistance of counsel clause of the Sixth Amendment.

(2) Whether the Federal Firearms Act which prohibits the interstate transportation and receipt of firearms by any person who has been convicted of a crime of violence defined by the act to include "burglary", prohibits the transportation and receipt of firearms by a person who has been convicted under a state second degree burglary statute of breaking and entering a jewelry store with intent to steal.

(3) Whether it was error to refuse to require production for inspection of all of petitioner's testimony before the grand jury where part of his testimony was introduced and used as evidence against him at his trial.

(4) Whether evidence obtained by state officers in a search and seizure found to be illegal in a proceeding in a state court of a state which follows the rule of exclusion is admissible in federal court despite the Fourth Amend-

ment and the standards for the enforcement of federal criminal statutes in federal courts.

(5) Whether, in a prosecution for the interstate transportation of a firearm by a person who has been convicted of a crime of violence, it is error to instruct the jury relative to the testimony of the defendants as witnesses that after a witness is impeached by showing a felony conviction the entire testimony of an impeached witness may be disregarded.

(6) Whether, in a prosecution for the interstate transportation of firearms by any person who has been convicted of a crime of violence and conspiracy to commit that substantive offense, petitioner's knowledge that his co-defendant was reputed to have a criminal record and had been in prison is sufficient to support his conviction as an aider and abettor and a conspirator.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Federal Firearms Act, § 1, 15 U. S. C. 901, provides in part as follows:

Definitions

As used in this chapter——

* * * * * * *

(6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, robbery, burglary, housebre[illegible]ng; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.

* * * * * * * * *

Federal Firearms Act, § 2, 15 U. S. C. 902, provides in part as follows:

* * * * * * *

(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter.

* * * * * * * *

Amendment 4 of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effect against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * * * * *

Amendment 5 of the United States Constitution provides in part:

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

* * * * * * * *

Amendment 6 of the United States Constitution provides in part:

In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

STATEMENT.

This is a companion case to Joseph Costello v. United States, now pending before this Court. Petitioner was convicted by a jury on counts 1, 2 and 4 of a four count indictment which charged in the first two counts that he and Joseph Costello transported a described firearm in interstate commerce subsequent to a conviction of Costello of a "crime of violence" described as burglary. The fourth Count charged both defendants with conspiracy to commit the substantive crimes charged (R. 1-3).

The evidence on behalf of the government may be summarized as follows:

Petitioner was a supervisor and cab driver of a cab company in St. Louis, Missouri, and Costello was its principal officer. In 1955 petitioner and Costello went to the shop of a gun dealer in Illinois and talked about guns. Later petitioner ordered three guns, which he obtained, signing the name of Joe Overbeck in the dealer's register (R. 104-109). These guns were transported to Missouri. One of them was found in Costello's car (R. 138), another was sold to a tavern operator (R. 114-155), and the third was not the subject of an indictment count (R. 124).

Costello had been convicted in a Missouri State Court in 1936 under an information which charged that he did break and enter a certain jewelry store with intent to steal, and this was the conviction relied upon by the government to constitute "burglary" and a "crime of violence" within the meaning of the statute (R. 59-60, 266-270). In order to prove that petitioner had knowledge of this conviction, the government introduced testimony of petitioner before the federal grand jury on April 23, 1956, to the effect that petitioner knew Costello had the reputation of having a

criminal record (R. 80, 92-93). Petitioner objected to the introduction of his grand jury testimony at the trial (R. 76, 79-80), by a pre-trial motion to suppress evidence (R. 7-8) and a motion to dismiss the indictment (R. 6) on the ground that petitioner was called before the grand jury at a time when he was a "de facto" defendant for the purpose of compelling him to give testimony against himself without being advised that he himself was under investigation. Petitioner had also testified before the grand jury on April 18, 1958. Initially the Assistant United States Attorney had drawn up an indictment against Costello alone (R. 18, 20, 22-25). But after hearing petitioner's testimony on April 18, the Assistant United States Attorney joined him as a defendant (R. 26) and recalled him for further testimony on April 23 (R. 18, 91-184), with the admonition that "Mr. Cannella, I believe I should tell you that you are not required to make any statement here that might tend to incriminate you, you understand that" (R. 19, 78, 92). Petitioner and Costello were indicted on that date (R. 1). The Court denied petitioner's motion to require the government to furnish him a copy of his testimony on April 18 (R. 76-78).

Costello was arrested by St. Louis Police Officers who later found one of the guns involved in his automobile on searching it at police headquarters (R. 12-14). The arrest, search and seizure was found to have been illegal under Missouri Law in a criminal case against Costello arising out of his arrest (R. 34-36).

Petitioner testified that he alone had purchased the firearms, that he had borrowed Costello's automobile and had left one of the firearms involved in the glove compartment (R. 210-214). Petitioner himself had been convicted of the crime of selling intoxicating liquor without a license (R. 281-282).

The trial judge, in its instructions to the jury, stated that a witness may be impeached by showing that he has been convicted of a felony and told the jury that if it found the "credibility of a witness has been impeached, you are at liberty to disregard the entire testimony of that witness, unless such testimony has been corroborated by other evidence" (R. 317).

The court below affirmed the conviction and found in regard to petitioner's compelled appearance before the grand jury on April 23 that petitioner had been duly warned of his rights and gave his testimony voluntarily. The court noted that in regard to his appearance on April 18, 1956, the Assistant United States Attorney stated "it is a fair statement to say that after I heard Cannella's testimony he was joined as a defendant." In regard to the request for production of petitioner's testimony before the grand jury on April 18, 1956, the court found that the ends of justice did not require the invasion of the secrecy of the grand jury. The court found that Costello's prior conviction was "burglary" within the meaning of the Federal Fire Arms Act because Congress did not intend to give that crime the meaning it had at common law. No error was found in the admission into evidence of the gun found in Costello's glove compartment because no federal officer was shown to have participated in the search. The court also concluded that petitioner's knowledge that his co-defendant was reputed to have a criminal record and his signing of a false name in the gun register were sufficient to support his conviction as an aider and abettor and a conspirator. The instructions which were given as to credibility of witnesses were found to be reasonable and proper.

REASONS FOR GRANTING THE WRI

1. This is manifestly a case involving the calling of a "de facto" defendant before a Grand Jury for the purpose of obtaining damaging admissions. An important issue is presented as to what testimony may be taken from a person after it has been decided to seek an indictment against him as well as what use may be made of Grand Jury testimony where a witness marked for prosecution has not been informed that an indictment will be brought against him after he testifies.

Petitioner was subpoenaed to appear before the federal grand jury on two separate occasions, April 18, 1956, and on April 23, 1956 (R. 18, 24, 26). The Assistant United States Attorney stated that at the time of his first appearance petitioner was not a potential defendant, but that after hearing his testimony on this first occasion that he was so considered (R. 24, 26). In oral argument before the Court below, the Assisfant United States Attorney conceded that an indictment naming petitioner as a co-defendant had been drafted prior to the second appearance. Petitioner was admonished upon his second appearance that he was not required to make any statement that might tend to incriminate him but was not told that he was a "de facto" defendant (R. 19, 78, 92). The indictment was returned on this very day (R. 1). During this second appearance petitioner gave testimony which was subsequently introduced over objection in the trial of this cause in an attempt to show the requisite knowledge on his part that Costello had been convicted of a "crime of violence" (R. 76-81). It is indeed evident that he was brought before the grand jury for the very purpose of securing this evidence against him. In connection with his compelled appearance before the grand jury petitioner Cannella urged the trial court to suppress as evidence all evidence obtained directly or in-

directly from his testimony before the grand jury and sought a dismissal of the indictment (R. 6-8). He also objected to the introduction of his grand jury testimony at the trial (R. 75-80).

Certainly on some occasions a witness may be called before a grand jury and it will subsequently be determined that he should be made a defendant in the matter under investigation. It is not petitioner's contention however that the mere appearance of a defendant before a grand jury as a witness is sufficient to warrant the suppression of his testimony or to grant the person immunity from prosecution but it is petitioner's position that once it becomes known that a person is a prospective defendant he should not be compelled to appear or having appeared should be advised that he is being investigated. If a person is a "de facto" defendant then he should either not be called as a witness before the grand jury investigating him or if called he should be advised of his position so that he may intelligently determine whether or not to avail himself of his constitutional guarantees. A prospective defendant should not be brought before the grand jury for interrogation on the point for which he is being investigated. If he is allowed to be so interrogated then the warning required should not be merely an admonition that he need not give any incriminating statements, but should be a warning that he is considered to be a defendant and is himself under investigation. Only in this way can a witness before a grand jury be so advised of his status as to be capable of making the necessary decisions whether or not to answer any questions.

It has been recognized that it is a serious question whether or not a prospective defendant is subject to subpoena before the grand jury. This question was considered but not answered in **Powell v. United States**, D. C. Cir., 226 F. (2d) 269, 274, and **United States v. Scully**, 2

Cir., 225 F. (2d) 113. Cf. **United States v. Parker**, 7 Cir., 244 F. (2d) 943. In the **Scully** case the court found that the record did not show that the defendant was marked for prosecution but concluded that the practice of calling prospective defendants before the grand jury was highly questionable.

An individual charged with a crime is not compelled to give evidence against himself because of the protection of the Fifth Amendment. He is also entitled to the assistance of counsel under the Sixth Amendment. The procedure followed in the instant case constitutes a distinct threat to the preservation of these safeguards. The prosecutor now may simply delay the presentation of an indictment to the grand jury. He avoids telling the accused that he is to be indicted and compels him to appear before the grand jury by means of a subpoena. The accused, appearing without the assistance and presence of counsel, and unaware of intended action against himself, is caught off guard and answers the questions propounded to him and his admissions are then introduced in evidence against him when he is brought to trial and used to make a submissible jury case against him.

It is clear that petitioner's rights were violated when he was called before the grand jury that was investigating him and interrogated about the very offenses for which he was indicted on the very day he testified and when his testimony was used at the trial for the purpose of convicting him.

2. The argument concerning the question as to whether the term "burglary", included as a "crime of violence" in Section 1 (6) of the Federal Fire Arms Act, is broad enough to embrace a conviction for breaking and entering a jewelry store with intent to steal, second degree burglary under Missouri law, is set forth in the companion case of Joseph Costello v. United States, now pending before this

court on petition for writ of certiorari. Petitioner herein adopts the argument advanced in the Costello petition.

3. Prior to trial petitioner's motion to inspect his grand jury testimony was overruled (R. 9, 28). After the government introduced into evidence his testimony before the grand jury on April 23, 1956, petitioner's further request for the production of his testimony on April 18, 1956, was still denied (R. 61-62, 76-77). The testimony on April 23 did, in fact, refer to his testimony on April 18 (R. 75, 85, 88, 92, 102-103). It was necessary for the government to prove that petitioner had knowledge that his co-defendant had been convicted of a crime of violence. The evidence offered by the government to prove this fact was petitioner's grand jury testimony of April 23, 1956 to the effect that petitioner had heard that Costello had a criminal record and had been in prison. The testimony also showed that petitioner admitted that he went to the gun shop with Costello (R. 93, 95-96). Petitioner should have been allowed to inspect his prior grand jury testimony because it may have explained the portion of the testimony introduced by the government.

A defendant whose grand jury testimony is introduced into evidence is entitled to know what had gone before the critical testimony introduced since this might throw light on that testimony. This is the rule in perjury cases. **United States v. Remington,** 2 Cir., 191 F. 2d 246, 250. The production of this testimony is not dependent upon its admissibility at the trial. **Gordon v. United States,** 344 U. S. 414. In **United States v. Klock,** 2 Cir., 210 F. (2d) 215, the defendant was denied the right to inspect the remainder of his grand jury testimony after the government introduced a portion at the trial. The court held the error to be harmless because the portion introduced was not an essential element of the case and a complete contradiction of the portion introduced would not have consti-

tuted a defense. But, in the instant case, if the portion of petitioner's testimony introduced were not believed, there would be no basis for sustaining his conviction. Nor is the fact that grand jury proceedings are secret a valid basis for the denial of the right to inspect inasmuch as the government broke the veil of secrecy by introducing portions of the testimony. Cf. **United States v. Andolschek,** 2 Cir., 142 F. (2d) 503.

Petitioner should have granted the right to inspect his grand jury testimony prior to trial and the error was magnified by the denial of his motion to inspect after the government had introduced a portion thereof. Cf. **Jencks v. United States,** 353 U. S. 657. Certainly, if the other portion of his grand jury testimony had shown that he was of the impression that Costello had been confined in prison for an offense clearly not a crime of violence, it would have been competent evidence to explain the portion introduced. Without the right of inspection, petitioner was deprived of certain rights essential to his defense and as stated in the **Remington** case, supra, he is not required to rely upon his memory as to what transpired in the grand jury room.

4. The argument relative to the question as to whether evidence obtained by state officers in a search and seizure found to be illegal in a state court proceeding in a state which follows the rule of exclusion is admissible in federal court is set forth in Costello's petition and is adopted herein.

Petitioner had a sufficient interest in the guns found in Costello's car to challenge the unlawful character of the search and seizure. **United States v. Jeffers,** 342 U. S. 48.

5. Petitioner adopts the argument in the Costello petition on the question as to whether it is error, in a prosecution which has a prior conviction of a felony as an element of the offense, to instruct the jury after defendants testify,

that when a witness is impeached by showing a felony conviction, his entire testimony may be disregarded.

6. The evidence was insufficient to sustain petitioner's conviction because the government wholly failed to prove his knowledge of the fact that Costello had been previously convicted of a crime of violence. Petitioner was charged in Counts I and II as an aider and abettor and in Count IV as a conspirator (R. 1-3). It has been held that one cannot be an aider and abettor in the commission of a crime without knowledge of the crime. **Nye and Nissen v. United States,** 336 U. S. 613. Similarly, in a charge of conspiracy it must be shown that knowledge on the part of the accused is present. **Direct Sales Company v. United States,** 319 U. S. 703; **United States v. Falcone,** 311 U. S. 205.

The evidence offered to establish knowledge on the petitioner's part was his testimony before the Grand Jury on April 23, 1956 to the effect that petitioner knew that Costello had at one time been confined in prison (R. 78-80). He did not know for what reason Costello had been confined and had no knowledge of the nature of the charge of which he had been convicted (R. 80). Knowledge necessary in order to convict one as an aider and abettor or a conspirator under the instant charges must be knowledge of the fact that there existed a prior conviction of a crime of violence because the statute, specifically limits its application to those who have been convicted of a crime of violence. Knowledge that a person has been in jail is clearly insufficient as it is quite possible that it was the result of a conviction which is not specified by 15 U. S. C. A. 901 as a crime of violence. Therefore, mere knowledge of the fact of previous confinement is not equivalent to knowledge of the cause thereof, which is the critical factor in the statute under consideration. Conversely it is quite possible for one to have been convicted

of the crime of violence and yet never have been confined in any jail or prison. The fact that petitioner signed the name Joe Overbeck on the gun register is colorless to show that petitioner aided, abetted or conspired to commit a federal crime.

We are here concerned with a statute which specifically limits its application to persons who are members of a certain class, namely, those who have been convicted of a crime of violence as defined by the statute. Certainly then when this limited application is granted to those charged as principals, the same limitations must be placed upon charge against those accused merely as aiders and abettors or conspirators.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15,800

Joseph Costello, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 15,801

Joseph John Cannella, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 20, 1958.]

Morris A. Shenker and Sidney M. Glazer for Appellant Joseph Costello.

Norman S. London (Mark M. Hennelly was with him on the brief) for Appellant Joseph John Cannella.

Forrest Boecker, Assistant United States Attorney (Harry Richards, United States Attorney, was with him on the brief) for Appellee.

Before SANBORN, WOODROUGH, and JOHNSEN, Circuit Judges.

WOODROUGH, Circuit Judge.

Joseph Costello and Joseph John Cannella prosecute these separate appeals from convictions upon jury verdicts for violating the Federal Fire Arms Act, to-wit: Sections 902(e) and 902(f), Title 15, U.S.C.A., and conspiracy to violate said sections.

Section 902(e) makes it "unlawful for any person * * * who has been convicted of a crime of violence * * * [including burglary, Section 901(6)] to * * * transport or cause to be * * * transported in interstate commerce * * * any firearm * * *." Section 902(f) makes it "unlawful for any person who has been convicted of a crime of violence [including burglary, Section 901(6)] to receive any firearm * * * which has been * * * transported in interstate * * * commerce * * *."

Each of the first two counts of the indictment charged the transportation of a described firearm in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, by both defendants and that one of them, namely, Costello, had prior thereto been convicted of a crime of violence, to-wit: the crime of burglary in the Circuit Court of St. Francois County, Missouri. The third count charged against Costello alone that he unlawfully received a described firearm which had been transported in interstate commerce, having prior thereto been convicted of the said crime of violence. The fourth count charged both defendants with conspiracy to commit both offenses by transporting and causing to be transported in interstate commerce the described revolvers from Granite City, Illinois, to St. Louis, Missouri, and having Costello receive one of them, Costello having been convicted of the crime of violence prior to the inception of the conspiracy. The overt act charged was that Costello obtained several of the described revolvers from one Earl Lewis in Granite City, Illinois.

There was substantial evidence: that Costello lived in St. Louis, Missouri, and was the officer in charge of the Ace Cab Company in that city and Cannella, who also lived there, was in the employ of the Company as a supervisor and cab driver; that they were closely associated during the relevant period; that Costello had been convicted of burglary in St. Francois County, Missouri, in 1936; that Costello made inquiry of a witness, Harry Arnold, about getting a .38 caliber Smith and Wesson Terrior model revolver and was referred to Earl Lewis, a licensed gun dealer in Granite City, Illinois; that Costello and his co-defendant Cannella together went to the gun shop of Earl Lewis and were there shown and talked about "guns". (throughout the trial the words "gun" and "revolver" were used as synonymous); and that Cannella came to the shop alone and ordered three guns which Earl Lewis undertook to obtain for him. He left a note with Lewis containing the telephone number of the Ace Cab Company where Lewis could reach him under the name of "Joe". When the guns had been delivered to Lewis he telephoned the Ace Cab Company and asked for "Joe", "the Joe that knew Earl Lewis" [both appellants are named Joe] and informed the Joe who answered that he had the guns. Cannella then went and got the three guns described as Smith and Wesson Chief Special 38 Caliber, numbered 65965, 69436, and 68897 respectively, which were identified without dispute and received in evidence at the trial. Cannella paid about one hundred and eighty dollars for them and signed the false name of Joe Overbeck as purchaser in the gun dealer's register together with a false address. One of the guns marked exhibit 6 was subsequently found, fully loaded, in the locked glove compartment of the automobile driven by Costello when he was arrested. The compartment was opened with a key which was in Costello's possession at the time of his arrest, although Costello denied having a key for the compartment.

Cannella made a statement to the F.B.I. officers in writing and signed by him to the effect that he bought the guns at the gun shop of Earl Lewis in Granite City, Illinois; transported them in interstate commerce from Illinois to Costello's Ace Cab Company office in St. Louis, Missouri, and delivered them to Costello; all at the direction of Costello; and that the money for the purchase was furnished him by Costello. He also testified before the grand jury, which returned the indictment herein, as to his intimate association with Costello and his knowledge of Costello's former conviction of law violation and imprisonment. Both defendants plead not guilty, testified in their own behalf on the trial, and denied the charges against them. Further details of the evidence will be brought out in our discussion of the points argued by the appellants, respectively, for reversal. Each appellant is represented by his own able counsel as he was on the trial.

Appellant Costello's contentions for reversal are summarized as follows: that the court erred (1) in treating the crime of burglary for which he was convicted in 1936 as the "crime of violence" defined as "burglary" in Section 901 (6) of the Fire Arms Act; (2) in refusing to suppress the revolver obtained by illegal search of his car by St. Louis Police officers and receiving their testimony in evidence; (3) in denying him a separate trial; (4) in refusing to require production for inspection of all of Cannella's testimony before the grand jury; (5) in admitting testimony given by Cannella to the grand jury on April 23, 1957; (6) in allowing the government to cross examine and impeach witnesses called by it; (7) in refusing to grant a mistrial on account of certain incidents at the trial; (8) in instructions given and refused; and (9) in denying Costello's motion for acquittal at the close of the evidence for insufficiency of the evidence.

Appellant Cannella presents all of the contentions for reversal of his conviction that are argued on behalf of

Costello—each appellant from his own angle—and also stresses that the court erred in refusing to dismiss the case against him; (1) on account of his lack of knowledge of Costello's conviction of a crime of violence if such there was; (2) on account of his compelled appearance before the grand jury; and (3) because the court erred in admitting into evidence his oral and written statements to the F.B.I. agents.

Opinion as to Costello.

1. The prior judgment of conviction entered against Costello in St. Francois County, Missouri, in 1935, recited that he was found guilty of burglary and larceny "as charged in the information" and the information referred to (offered by defendants and excluded) charged that on or about the 26th day of May, 1935, Costello feloniously and burglariously did forceably break into and enter a certain jewelry store with intent to steal certain described jewelry therein and did steal it.

Costello contends that the word burglary used in Section 901 (6) must be given the meaning it had at common law and in any event does not include the crime Costello was shown to have committed in 1936. Burglary at common law "is the breaking and entering in the night time of another's dwelling house with intent to commit a felony therein." 9 Am. Jur. Burglary, Section 1, page 239; 23 A.L.R. 288.

The contention is not without weight as the Supreme Court has declared "that where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning." *United States* v. *Turley*, 352 U.S. 407, 411-412. But the Court in the same opinion declared that although criminal statutes are to be construed strictly "this does not mean that every criminal

statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." It is appropriate to consider the purpose of the Act.

The Act here involved was passed in 1938 and by that time the law against burglary in practically all the states, certainly in all the states of this circuit, had developed so as to include not only common law burglary, but also the acts charged and adjudged against Costello as constituting burglary in this case. 23 A.L.R. 288. The sections of the Fire Arms Act in question were directed against persons who had been convicted of "crimes of violence" and the reason for including burglary in the definition was that burglary has always been and now is universally so regarded. It is unreasonable to infer that Congress intended the word burglary as used in Section 901 (6) to be given the restricted meaning that it had at common law. Counsel has argued that if the term burglary in the section be not governed by the common law definition, any state legislation calling a traffic offense by the name of burglary would bring it within the federal statute. But as stated by the Court of Appeals for the First Circuit in *Cases* v. *United States*, 131 F.2d 916, 924; "It does not seem to us that there can be a sufficiently wide variety in the definition in the different states and territories of the crimes listed to make this classification unconstitutional [as discriminatory]."

But if in some cases an instance should be presented where state legislation defines as burglary some offense that is not a crime of violence, a question may be presented that is not here involved.

The question raised for the appellants as to the meaning to be given "burglary" was considered by the District Court of Colorado in *United States* v. *Kelly*, 146 F.Supp. 747. The defendant there tried under the Fire Arms Act, had been previously convicted like Costello of so called

second degree burglary under the Missouri statute. We quote with approval the following observations the court made when considering the motion for judgment of acquittal:

> "It would be a strange holding indeed for this court to say that it was the intent of Congress that one having been convicted of burglary by breaking into a building other than a dwelling house at a time other than between sunset and sunrise is more fit to have in his possession a firearm than one whose nefarious activities have been limited to dwelling houses at night.
>
> * * * * * * *
>
> "Moreover, in the opinion of the court, on the face of the statute, Congress showed its intention that the designated crimes of violence were to take their meaning from the statutes of the states where the conviction was had. Following the description of certain crimes of violence, Section 901(6) of 15 U.S.C.A., concludes by setting forth,
>
> > 'or assault with intent to commit any offense punishable by imprisonment for more than one year.'
>
> "Can it be said that 'any offense' means 'any offense at common law?' The answer has to be in the negative for the term 'any offense' is limited by the minimum imprisonment meted out for the assault to commit such offense, and this must be governed by state law, for the punishment at common law for assaults with intent to commit felonies 'varied according to the discretion of the court.' Wharton, Criminal Law, 12th ed. § 840, p. 1126." 146 F. Supp. 747, 752-753.

Compare *Braswell* v. *United States*, 10th Cir., 224 F.2d 706, where the defendant, accused under the Fire Arms Act had been convicted of burglary in a Texas court. In

Texas as in Missouri, burglary includes daytime breaking and entering of buildings other than dwellings, but the record of the case indicates that the Court of Appeals for the Tenth Circuit was not even called on to consider the question argued here. It affirmed conviction.

No error is found here in the rulings to the effect that the "burglary" on account of which Costello was charged and convicted in 1935 was "burglary" within the Fire Arms Act.

2. Costello was arrested by St. Louis Police Officers and taken to the city jail where he was searched and questioned and discharged. The Cadillac car which he was driving when arrested was also searched. He denied having a key to the glove compartment in the car, but the police officers found one of the keys taken from him fitted the glove compartment lock. The officers opened the compartment with the key and took possession of the revolver contained in it, which was shown to be the revolver described in the indictment as having been received by him. The arrest, search, and seizure were found to have been illegal under Missouri law in a proceeding in the Missouri State Court and it is not contended for the government that they were legal under the federal law. But it was not shown that any federal officer took part in the search and the court's refusal to suppress the gun and receiving it in evidence were sanctioned by the decision of this Court in *Jones* v. *United States*, 8 Cir., 217 F.2d 381, 382-383. Cf., *United States* v. *Benanti*, 2nd Cir., 244 F.2d 389, 392. The court's refusal to suppress the guns was without error.

3. This case presented the situation where one of the two defendants had given a statement orally and in writing to agents of the F.B.I. before the indictment was found, concerning the transactions upon which the indictment was based, and the other defendant had not done so.

In pre-trial proceedings and commencing at the opening statement and on many occasions during and after the trial, and on this appeal, Costello, who had not made any statement, has earnestly and persistently contended that he was entitled to a severance and trial apart from Cannella.

But Rule 8(b), Federal Rules of Civil Procedure, 18 U.S.C.A., provides that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same transaction or in the same series of acts or transactions constituting the offenses charged. Under Rule 13 the court may order two or more indictments to be tried together if the offenses and the defendants could have been joined in a single indictment.

In this case the two defendants were closely associated in their work and otherwise. The charge against them in counts one and two, supported by the evidence, was that one defendant was an aider and abettor of the other in transporting the guns and therefore both were charged as principals. The fourth count was for conspiracy and guilty participation by both was necessary to convict either. It was necessary to show the acts of both defendants at the relevant times in order to obtain a realistic picture of the transactions involved. It is true that in trying them together the statement made by the one who had made it after the acts was hearsay and not probative of guilt as to the other, but the record in this case shows that the law to that effect was stated to and impressed upon the jury by the court and by each and all attorneys participating in the trial literally scores of times.

The ultimate question whether or not Costello aided and abetted Cannella in transporting the guns or whether they conspired to transport them or to have Costello receive them was not of such complicated nature that the evidence against each could not be separately considered as to each.

It is firmly settled for this Court that "the mere fact that admissions have been made by one [defendant] which are not evidence against the other is not a conclusive ground for ordering the parties to be tried separately." *Kansas City Star Co.* v. *United States*, 8 Cir., 240 F.2d 643, 652; In *Opper* v. *United States*, 348 U.S. 84, 95, the Supreme Court said:

> "* * * The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial."

We find no error requiring reversal because of the joint trial of the defendants.

4 & 5. The evidence was that Cannella first gave statements to agents of the F.B.I. on April 10, 1956, and was first called before the grand jury to testify on April 18, 1956. The Assistant United States Attorney in the Eastern District of Missouri, Forrest Boecker, testified that on April 17, 1956, he had caused an indictment to be drawn up charging Costello alone with the offenses later charged against the two defendants in counts one and two of the indictment. He put questions to Cannella on his first appearance before the grand jury but did not question him as a prospective defendant or have in mind that Cannella was implicated in the proposed charges against Costello. Mr. Boecker said that it was the view of the government at that time that [Cannella] was not an object of suspicion or a defendant. He said "it is a fair statement to say

that after I heard Cannella's testimony he was joined as a defendant." No evidence was adduced as to what Cannella testified to on April 18, 1956. He was subpoenaed again and testified before the grand jury on April 23, 1956. "He was warned [as to his constitutional rights] on April 23rd, but he was not warned when he appeared on April 18th." All the testimony he gave on the 23rd was made available to appellants. The prosecutor read part of it to the jury on the trial. The defendants read substantially all the rest but the court refused to compel the government to produce for inspection a copy of his testimony at his first appearance.

The ground on which the production was resisted was that there was no showing of cause to invade the secrecy of the grand jury in respect to it. In cases of alleged perjury before a grand jury a transcript of an accused's testimony there given must be made available, but no such charge was here involved. A trial court unquestionably had the power under Rule 6(e) of the Federal Rules of Civil Procedure, 18 U.S.C.A., to order the grand jury proceedings transcribed and produced. Such power should be exercised only where there is a clear showing that the ends of justice require it. *Lawn* v. *United States,* 355 U.S. 339, 362; *Herzog* v. *United States,* 9th Cir., 226 F.2d 561, 566. No such showing was made here and we find no prejudice to either defendant resulting from the court's refusal to compel the production and no error.

On the other hand the government offered and the court received statements which Cannella voluntarily made to the grand jury on his second appearance after he had been warned of his rights, to the effect that he had knowledge of Costello's prior conviction of a crime. His knowledge was not derived from seeing the record, but in his employment under and association with Costello he had heard it talked about and "it had been published in the newspaper". It is argued that "Costello was damaged by this

evidence because it showed that [because of the way Cannella had become informed] Costello had an ill name with his neighbors" and therefore "it opened the issue of his bad character". But whether or not Cannella knew of Costello's prior conviction was an essential element of the charge of the indictment to be inquired into and established. It was not error to receive evidence competent to prove a charge against the defendant because it may also prove more against him than he is charged with. We do not sustain either of the points we have numbered (4) and (5).

6. As to the complaint that the prosecutor was permitted to cross examine and impeach witnesses whom he had called, it appeared that the government witnesses Goldstein and David Cannella each testified contrary to a statement he had given to the government. When that developed the court permitted the government to interrogate the witnesses respectively concerning their former statements. The witness Goldstein also claimed in effect that government officers had wrongfully taken him from his home to the grand jury without opportunity to either dress himself or communicate and subjected him to wrongful coercion. The court permitted the officers concerned to testify in rebuttal to their serving of the subpoena upon Goldstein in ordinary and proper course. We do not find that the court abused its discretion either in permitting the questioning of the hostile witnesses - - - See and Compare *Meeks* v. *United States,* 9th Cir., 179 F.2d 319; *Carrado* v. *United States,* D.C. Cir., 210 F.2d 712, cert. den. 347 U.S. 1018; *United States* v. *Graham,* 2nd Cir., 102 F.2d 436, cert. den. 307 U.S. 643; *Moomaw* v. *United States,* 5th Cir., 220 F.2d 589; *Doto* v. *United States,* D.C. Cir., 223 F.2d 309, cert. den. 350 U.S. 847 - - - or in introducing the impeaching testimony which tended to protect the dignity of the court officers. *State* v. *Sharp,* 138 S.C. 58, 135 S.E., 635; *People* v. *Gross,* 230 Mich. 653, 203 N.W. 534; *Martin*

v. *State*, 80 Texas Cr. 199, 189 S.W. 264; *Caldwell* v. *State*, 82 Ga. App. 480, 61 S.E.2d 543; *Commonwealth* v. *Cohan*, 307 Mass. 179, 29 N.E.2d 693; *Tice* v. *State*, Okla. 283 P.2d 873.

7. Complaint is made of three instances during the trial when the court either in voicing its own reaction or in sustaining objections by the prosecution spoke somewhat sternly to defendant's counsel. The defense of the cases was carried on with earnestness, zeal, and skill by able counsel and we have not failed to fully consider the contention that the court's remarks were unfair and unjust. We think the colloquies complained of were not sufficiently important to merit repetition and we conclude that the defendants were in no wise deprived of the effective assistance of their counsel by any improper action towards them or statements by the court to them. *Goldstein* v. *United States*, 8th Cir., 63 F.2d 609, 613. On the contrary, the trial was conducted with fairness and dignity.

8. As to instructions given and refused. After instructing that Costello could be found guilty on the first count only on finding that he had requested and directed Cannella to transport the gun in interstate commerce, Costello having theretofore been convicted of burglary, the court then instructed that Cannella could be convicted upon that count only if Costello was found guilty thereon. It is argued that the instruction containing "an assertion of interrelationship of guilt" was erroneous under the decision in *United States* v. *Klass*, 3rd Cir., 166 F.2d 373, 380. The contention is without merit. In this case commission of the crime charged in the count was dependent, as the court charged, upon its having been instigated by the ex-convict, Costello. If any element of guilt on Costello's part was lacking Cannella could not be convicted.

The court instructed upon the credibility of impeached witnesses that the jury "may accept such portions of testi-

mony of such witnesses who has been impeached or who has knowingly testified falsely as you believe to be true and credible" and also that if either of the defendants made statements to investigating officers regarding the matter under inquiry and pertinent to the inquiry contrary to proven fact and did so willingly and with knowledge of the falsity "you are at liberty to consider that circumstance as evidence of that defendant's guilty conscience."

The instructions as a whole which were given as to credibility of witnesses were reasonable and proper.

The court did not read to the jury the statute under which the indictment was laid, but the court stated all the elements necessary to a finding of guilty. That was fully sufficient in the case of a crime of such few and simple elements as was here involved. *Holland* v. *United States,* 10th Cir., 209 F.2d 516, aff'd. 348 U.S. 121; *United States* v. *Heine,* 2nd Cir., 149 F.2d 485, cert. den. 325 U.S. 885; *United States* v. *Capitol Meats,* 2nd Cir., 166 F.2d 537, cert. den. 334 U.S. 812; *Lewis* v. *United States,* 10th Cir., 49 F.2d 272.

The court gave the jury what has been referred to as the "Allen instruction" in which the jury was urged to try to agree upon a verdict and we find no error in giving the instruction. *Allen* v. *United States,* 164 U.S. 492; *United States* v. *Wright,* 8th Cir., 175 F.2d 384, cert. den. 388 U.S. 873; *Nick* v. *United States,* 8th Cir., 122 F.2d 660, cert. den. 314 U.S. 687; *Bowen* v. *United States,* 8th Cir., 153 F.2d 747, cert. den. 328 U.S. 747.

In addition to his contention that he had not been convicted of "burglary" within the Act, Costello also contended on his motion for instructed verdict that there was insufficiency of the evidence that he in any way participated in the purchase of the guns. We think the competent circumstantial evidence as outlined herein required submission of that question to the jury.

Opinion as to Cannella.

Cannella was interrogated by F.B.I. agents and made a voluntary statement to them as follows:

"I, JOSEPH JOHN CANNELLA, make the following voluntary signed statement to Special Agents Herbert K. Moss and Earl C. Porter, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. I have been advised that I do not have to give a statement and that any statement I do make may be used against me in a court of law. No threat or promise of reward have been made to me in order to get me to give this signed statement. I have been advised of my right to consult with an attorney prior to furnishing a statement. I was born April 12, 1915, at St. Louis, Missouri. I have been employed as an Ace Cab owner and supervisor for Ace Cab Company since about November, 1953. I presently reside at 4713 Hatz, Northwoods, Missouri. About the first part of December, 1955, Joseph Costello said to me at the Ace lot 'Let's take a ride to Granite City, Illinois', and Costello and myself then drove in Costello's Cadillac automobile to Granite City, Illinois. Upon arrival in the vicinity of Granite City, Costello said, 'We have to look around for a gun shop'. However, Costello and I drove directly to Earl Lewis Gun Shop in Granite City, Illinois, in Costello's blue Cadillac convertible. This is the only stop we made. Upon arrival at the Earl Lewis Gun Shop in Granite City, Illinois, there was only one man present whom I know to be Earl Lewis, and he provided a catalogue of guns and Costello looked in the catalogue and picked out three guns from the catalogue and Costello told Lewis to order three guns for Costello and to call me when they arrived. I told him to call 'Joe, the supervisor', and to aid him in doing so I wrote the notation 'Joe, Main 1-8495'. Costello and I then returned to St. Louis, Missouri, and ap-

proximately a week later I received a radio call from the Ace Cab dispatcher requesting I call the Ace Cab office. I did call the Ace Cab office and a girl in the office told me to call a certain number. I did call this number and it was Earl Lewis. He advised me the guns that Costello had ordered had arrived. I then had the Ace Cab office tell Joe Costello that the guns had arrived at Lewis Gun Shop at which time Costello gave me $180. in cash, and I proceeded to the Earl Lewis Gun Shop, Granite City, Illinois, and upon arrival was advised by Lewis that the guns were not the exact type as ordered by Costello. From the Earl Lewis Gun Shop I then called Costello and he told me if the guns were not as he had ordered for me not to accept them. I did not accept these guns, and returned to St. Louis. Upon arrival at the Ace Cab lot I offered the $180 to Costello which $180 he had originally provided me to buy the three guns, at which time Costello directed me to put the $180 in an envelope and give to Joe Muth, and have Muth put the envelope containing the money in the office safe at the Ace Cab office, which I did. About one week thereafter I again received a radio call from the radio dispatcher of the Ace Cab Company advising me to call the Ace Cab office, which I did. Some girl in the office advised me to call a certain number, which I did, which was the Earl Lewis Gun Shop, Granite City, Illinois. Lewis told me the guns that Costello had originally ordered had arrived. I then told Joe Muth that I wanted the envelope out of the office safe, which he gave me, and on the same date I made the telephone call to Lewis I proceeded to the Earl Lewis Gun Shop, Lewis gave me the three guns which Costello had originally ordered, and I gave Lewis $180 as a purchase price for these three guns, and Lewis gave me some change, exact amount not recalled by me. However, it was only a few dollars, as I recall that the purchase price for each gun was approximately

$59. This was the sum of $180 that Joe Costello had originally given to me as a purchase price for these guns as referred to above. Before departing from Lewis Gun Shop I signed the name 'Joe Overbeck, 4186 Kingshighway', city and state not shown, as a purchaser for these guns. I then returned to the Ace Cab lot, St. Louis, Missouri, with the three guns in the cartons, took them in and placed them on a desk in Joe Costello's private office. In my presence Costello opened the cartons and looked at the guns. I have not seen these guns since delivering them to Costello in his private office. Sometime later, on the day or the day after Costello was arrested by the St. Louis Police Department in early 1956 * * *. Special Agent Porter has exhibited to me a longhand entry dated December 22, 1955, in the name 'Joe Overbeck, 4186 Kingshighway'. I wish to state that this is my handwriting. Also Mr. Porter has exhibited to me a note 'Joe, Main 1-8495', which I state is likewise in my handwriting. I provided this note with the name 'Joe' to Earl Lewis on my first visit to Lewis Gun Shop. The entry 'Joe Overbeck, 4186 Kingshighway' was made by me when I received the three above-mentioned guns from Lewis."

Other statements made to the agents by Cannella before he made the above were checked as to veracity by the agents in his presence by telephone and discredited. Thereupon he gave the above account, which he said was the truth and at the conclusion of it he said he was fearful that it would come to Costello's attention that he had provided the information and "he did not think his life would be worth a nickel." He began rubbing his hands over his forehead and said "My God, My God, what is going to happen to me" and he became ill.

(1) It is strenuously argued for both defendants that the court erred in receiving the testimony of the agents

concerning Cannella's conduct and exclamations at the time he gave them his statement. The circumstances bore not only upon the admissibility of Cannella's statement against his interest but also upon its credibility. It was a voluntary statement freely made and there was no error in receiving it in evidence together with the testimony as to the circumstances surrounding the giving of it.

(2) The government offered in evidence and the court received the testimony which Cannella gave to the grand jury at his second appearance before it on April 23rd, concerning his knowledge of Costello's criminal record. Cannella had been duly warned of his rights and gave the testimony voluntarily. Both as a witness before the grand jury and as a witness in his own behalf at the trial he denied knowing the specific crime for which Costello had been convicted in 1935. The court instructed and it is conceded that Cannella could not be convicted unless "he knew that Costello had been convicted of burglary as charged in the indictment". The government "submits that such knowledge was imputed to [Cannella] by circumstantial evidence and by [his] partial admission". He admitted before the grand jury that he knew Costello was reputed to have a criminal record and that he had been in prison and when he obtained the guns (he said for Costello, with money supplied by Costello) he signed a fictitious name on the dealer's register and gave a false address. When he was first interrogated by the F.B.I. agents h gave a false account of the transaction and when he cha d his story and involved Costello he evinced a guilty conscience and fear of consequences.

We are not cited to precedents as to the degree of proof of knowledge of the principal's prior crime that is required to support conviction of an aider and abettor under the sections of the Act here involved. We think the situation is comparable to cases where the accusation is that of

receiving stolen goods knowing them to have been stolen. It has long been settled that such knowledge may be imputed beyond reasonable doubt by circumstantial evidence.

> "The requisite guilty knowledge need not be actual, direct, positive, or absolute, but may be constructive, implied, or circumstantial. It is not essential to a conviction that the requisite guilty knowledge that the goods were stolen should be actual, direct or positive and absolute, such, for instance, as knowledge acquired by having personally witnessed or observed the theft, or by information of the theft from persons who had personal knowledge, such as eye witnesses or the person from whom the goods were received; the requisite knowledge may be circumstantial or deductive, and constructive or implied knowledge through notice of facts and circumstances from which guilty knowledge may be fairly inferred satisfies the requirements as to knowledge. 76 Corpus Juris Sec. Section 8, p. 12."

In this case Cannella's admission that he knew that Costello had a criminal record and had been imprisoned for crime, coupled with his conduct in giving a false name and address to the gun dealer and his attempt to cover up Costello's connection with the purchase and transportation of the guns by false statements to the officers, constitute circumstantial evidence of his guilty knowledge sufficient to support the verdict of the jury on the issue.

Each of the assignments of error that have been discussed in relation to Costello have also been carefully considered in respect to Cannella, but we find the conviction of Cannella was without error.

Although some further points have been argued and have been fully considered, they lack merit and have not required discussion.

Both Costello and Cannella were accorded a fair trial and the convictions and sentences of thirty months as to Costello and eighteen months as to Cannella are affirmed.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

United States Court of Appeals for the Eighth Circuit.

No. 15801. September Term, 1957.
Tuesday, May 20, 1958.

Joseph John Cannella, Appellant,
vs.
United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Joseph John Cannella, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

May 20th, 1958.